

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT SCHWEYEN, D.D.S., and DR.
ROBERT SCHWEYEN, D.D.S., P.L.L.C.,

UNPUBLISHED
May 20, 2010

Plaintiffs-Appellees,

v

JAMAL HAMED, LAMA ZUABI, TAREK
ZOABI, and SOUTHGATE FUEL COMPANY,
INC.,

No. 290282
Wayne Circuit Court
LC No. 06-601954-CE

Defendants-Appellants,

and

ABDULLA S. ZINDANI and YOUSEF
ZINDANI,

Defendants.

Before: METER, P.J., and MURRAY and BECKERING, JJ.

PER CURIAM.

Defendants¹ appeal as of right from the trial court's order denying their motion to set aside the default judgment and request for new trial. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs filed the instant lawsuit for environmental contamination against defendants in January 2006. An initial trial date was set for December 2007. That trial was adjourned, but a second trial date was set after the court determined it could not enforce an inchoate settlement. Sanctions were also granted to plaintiffs at that time based on defendants' delay and bad faith. The second trial was set to take place in June 2008.

The June trial did not take place as scheduled but was rescheduled for November 2008. On November 5, 2008, plaintiffs and counsel were present in court along with defense counsel. None of the defendants were present. According to defense counsel, defendants were aware of

¹ References to "defendants" throughout this opinion are to appellants only. Defendants Abdulla Zindani and Yousef Zindani are not parties to this appeal.

the trial date but were out of the country and wanted an adjournment. The trial court denied that request, and heard plaintiff's testimony concerning damages. Defense counsel cross-examined plaintiff and made arguments concerning the amount of damages requested. Following the hearing, the trial court entered a default judgment against defendants in the amount of \$299,130.25.

Defendants filed a motion to set aside the default judgment and for a new trial, claiming surprise because they allegedly did not receive notice that an evidentiary hearing would be held. The trial court denied that motion and found that defendants knew of the trial but chose to not attend.

On appeal, defendants claim they were deprived of their property—specifically, the money awarded to plaintiffs—without due process of law. Defendants' brief on appeal announces their position that they were deprived of property without due process of law, but fails to elaborate or support that position with explanation or citation to any authority.

It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. If a party fails to adequately brief a position, or support a claim with authority, it is abandoned. [*Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).]

Additionally, “[i]f a party fails to adequately brief a position, or support a claim with authority, it is abandoned.” *Moses, Inc v Southeast Council of Michigan Gov'ts*, 270 Mich App 401, 417; 716 NW2d 278 (2006), citing *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Defendants have failed to adequately brief or support with authority the only claim they raise on appeal. Therefore, defendants' due process claim is abandoned.

In any event, the trial court did not abuse its discretion in refusing to set aside the default judgment.² Except when premised on a lack of jurisdiction, a motion to set aside a default or a default judgment should be granted only when both good cause is shown and an affidavit of facts evidencing a meritorious defense is filed. MCR 2.603(D)(1); *Kowalski v Fiutowski*, 247 Mich App 156, 158; 635 NW2d 502 (2001). As the defaulting party, defendants had the burden of demonstrating good cause and a meritorious defense. *Saffian v Simmons*, 477 Mich 8, 15; 727 NW2d 132 (2007). Good cause consists of: “(1) a substantial defect or irregularity in the proceedings upon which the default was based, (2) a reasonable excuse for failure to comply with the requirements which created the default, or (3) some other reason showing that manifest injustice would result from permitting the default to stand.” *Shawl v Spence Bros, Inc*, 280 Mich App 213, 221; 760 NW2d 674 (2008) (quotation marks and citations omitted). Factors relevant to the existence of a meritorious defense include whether there is evidence that: “(1) the plaintiff cannot prove or the defendant can disprove an element of the claim or a statutory requirement; (2) a ground for summary disposition exists under MCR 2.116(C)(2), (3), (5), (6), (7), or (8); or

² Although defendants' brief does recite the abuse of discretion standard, it does not contain the criteria governing a decision to set aside a default or default judgment.

(3) the plaintiff's claim rests on evidence that is inadmissible." *Id.* at 238. In determining whether there is a meritorious defense and good cause for setting aside a default, a trial court should consider the totality of the circumstances. *Id.* at 237. The determination of which factors are relevant and the weight to afford them is in the discretion of the trial court. *Id.* at 239. Whether a party has made a sufficient showing of good cause and of a meritorious defense are discrete inquiries, but the strength of a proffered meritorious defense can affect the necessary showing of good cause. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 232-233; 600 NW2d 638 (1999). That is, "if a party states a meritorious defense that would be absolute if proven, a lesser showing of 'good cause' will be required than if the defense were weaker, in order to prevent a manifest injustice." *Id.* at 233-234.

Defendants argued in their motion to set aside the default judgment that they were subpoenaed for the two prior trial dates but not for the third trial date of November 5, 2008. However, plaintiffs provided copies of the subpoenas showing that defendants were summoned to appear for the November 5, 2008 hearing. And, despite the subpoenas and the trial court order setting the date for trial, defendants were absent even though defense counsel acknowledged their duty to appear:

The Defendants were aware that they were required to attend trial. They indicated to me that they would appear, but, then, after receiving notice of the trial that was originally scheduled for November 24th, I received a telephone call indicating that no one would appear, that they were out of the country[,] [and that they] [h]ad no intention of appearing and requested that I obtain an adjourned trial date.

In their motion to set aside the default judgment, defendants claimed they were residing in Dubai at the time for employment and were, therefore, unable to attend the trial. But there is no indication in the record that they attempted to convey that information to the trial court ahead of time or seek an adjournment of trial. In the motion to set aside, the asserted good cause to set aside the default judgment was "based upon surprised [sic] since they did not receive adequate notice of the evidentiary hearing on damages." But, as indicated, they did receive notice of the scheduled trial itself, which presumably would have included proofs on damages, not just liability. Therefore, defendants did not provide a reasonable excuse for failing to appear on the trial date. Nor did defendants offer a meritorious defense on the questions of liability or damages.

Under the circumstances, the trial court's refusal to set aside the default judgment against defendants was not outside the principled range of outcomes.

Affirmed.

Plaintiffs may tax costs, having prevailed in full. MCR 7.219(A).

/s/ Patrick M. Meter
/s/ Christopher M. Murray
/s/ Jane M. Beckering